



## Criminal Law as Police Power: Serious Crime, Unsafe Protest and Risks to Public Safety

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### Abstract

This article considers the deepening of police power in the criminal law of New South Wales (NSW), Australia. It analyses the combined effects of four recent criminal law regimes that not only give the NSW Police Force more powers, but also reflect the significant role of institutional police power and the pre-emptive logic of criminal law. We examine: the introduction of serious crime prevention orders; the introduction of public safety orders; investigative detention powers in relation to terrorist acts; and confiscation, forfeiture and search powers, and trespass offences that target protests. Drawing on the work of 'police power' theorists, we argue that these new regimes illustrate the centrality of police power to the criminal law rather than a deviation from a putative, 'normal' criminal law.

### Keywords

Police power; criminal law; serious crime prevention orders; protest laws; public safety orders; investigative detention.

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## Introduction

This article considers recent extensions to police power in the criminal law of New South Wales (NSW), Australia. It analyses the combined effects of four new criminal law regimes that give the NSW Police Force more powers, deepen institutional police power and extend the pre-emptive reach of criminal law to govern apparent threats to social order. We examine: serious crime prevention orders, introduced by the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW); public safety orders, introduced by the *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016* (NSW); investigative detention of terrorist suspects, introduced by the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016* (NSW); and new confiscation, forfeiture and search powers, and trespass offences that target protests, introduced by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW).

The predominant critique of these new regimes characterises them as dangerous because they are ‘outside’ the normal criminal law, or because they create (police) justice systems ‘parallel’ to the criminal law (NSW Bar Association 2016). These are powerful arguments, especially when raised by legal professionals working within the criminal law. But, rather than beginning with the assumption that the new legislation has features that are epiphenomenal or alien to criminal law, our aim is to consider how the provisions reflect and shape the relationship between police power and criminal law.

Analysing the combined features and effects of these new regimes in NSW clarifies how criminal law and criminal process function through the power to police. We outline some of the features of these laws that shape the police power as one operative logic of the criminal law, and one source of its authority. We suggest that the blurring of categories of public order/organised crime and suspect/convicted offender that is evident across the new legislation is indicative of the criminal law’s power to police. In understanding these combined laws as police power, we analyse protest together with ‘serious crime’, and ‘ordinary suspects’ with terrorists. This method not only finds new hybrid categories of offender but also diagnoses over-reach. Our aim in locating criminal law’s power to police is also to de-centre the received categories of criminal law as it has been traditionally conceived.

This article begins by setting out our understanding of the criminal law as the exercise of the state’s police power as an expansive, pre-emptive governance also grounded in the legitimacy of legality and due process. The next section outlines some political context in which these laws were passed to draw attention to the earlier amplifications of police power that preceded them, before overviewing the rationale for each law. We then thematically address the combined effects of the laws in furthering four specific features of police power: the expansion of target populations; the expanding concepts of risk and potential harm; the transfer of judicial to police power; and the expanded punitive dimensions to policing. The article concludes by considering the conceptual utility of these features in understanding the police power function of the criminal law.

## Conceptualising the police power of the criminal law

The relationship between police power and criminal law raises a set of questions about what police power is, where police power can be located, and to what end. However, police power has been marginalised or ‘residual’ in the study of criminal law (Dubber 2006; Farmer 2006; Neocleous 2000, 2006). Criminal law is conventionally understood as separate from police powers and policing, with the latter limited to a study of police institutions. A result of confining policing to the institution of the police force is that a conception of police power as the diverse sources of authority to regulate the population is lost (see Dubber and Valverde 2006). At best, police powers extend to the study of criminal law as its ‘process’ rather than integral to criminal laws categories, operations and effects. The origins of the marginalisation of police power in the

study of criminal law lie in the conventional framing of Police and law as the separation between administrative and judicial power respectively (Neocleous 2000). Critical analyses of the law making power (McBarnett 1981) or the 'quasi-judicial' (Neocleous 2000: 105) or sovereign power of policing (Hardt and Negri 2000) have provided important correctives to one half of this dichotomy. Challenges to the prevailing idea of criminal law as a purely moral-juridical order rather than the state's power to police are shortly considered.

First, we provide a note on terminology. We use 'police power' in this article in two senses: first, to refer to the institutional and political power of the NSW Police Force in shaping criminal justice agendas; and, second, to highlight that power to police was the foundation of the criminal law (the greater focus of the article). We draw on a small body of critical policing literature, which challenges the dominant framework regarding Police and law, to distinguish between 'police powers' and 'the police power'. We consider these concepts in relation to each other.

By 'police powers', we refer to the broad range of legal and political authority conferred on the NSW Police Force to act on behalf of the state, including powers under the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA 2002)* (NSW), policies and regulatory frameworks (for example, in the *Police Act 1990* (NSW)), and criminal law offences. This is not to say that police powers are for law enforcement alone or derive their authority solely from law; rather, our approach acknowledges the productive nature of police powers in constructing state authority and social orders in particular places and times (Dixon 1997; Neocleous 2000).

In an influential characterisation, Dubber (2006: 107) sets out a theory of criminal law as police power, what he calls 'the police power model of the criminal process'. In brief, 'the police power' is the power of the state over its population to keep the public peace. The police power function of the criminal law is 'the identification and elimination of criminal threats to the state', not social harms to persons (Dubber 2006: 134). Dubber (2006: 118) maintains that 'criminal law in its entirety derives from the state's power to police; a crime is a crime insofar as it breaches the peace'. In this register, '... every offence in the end is a police offence, not just those traditionally categorised as such [emphasis in original]' (Dubber 2006: 118; see also Dixon 1997). Dubber is attentive to 'those features of the criminal law and process as a whole that reflect its foundation in the power to police' (Dubber 2006: 108). These key features include: the creation of 'offenderless offences' where implicit status offences replace traditional conduct and *mens rea* offences, and where the only victim is the state; a focus on incapacitation as the rationale for criminal laws intervention; and a reliance on inchoate offences like attempt, conspiracy, facilitation. These features of the police power enable criminal law to act upon a person's 'criminal character' rather than any behaviour resembling the elements of a criminal offence (Dubber 2006: 128-136).

In a related inquiry, Farmer's (2006: 147) thesis is that modern jurisprudence should include police power because much of the English state's power to police was juridified as the criminal law in the early nineteenth century and propelled by the birth of the modern police force. As a result, prevention and deterrence have been significant organising logics in the criminal law, which underpinned the exercise of the criminal law from that time (Farmer 2006). Foucault's work in charting the debates on the origins of prevention in criminal law has a corrective role in allaying the idea that prevention belongs to a police force and is alien to criminal law (Sentas 2014: 78-81). In his 1977 essay, *The Dangerous Individual*, Foucault (1990) followed the debates between criminal anthropologists and the International Association for Penal Law in the 1890s on the proper function of risk in the criminal law in order to incapacitate 'dangerous individuals'. The criminologists wanted to put aside legality by abandoning the notion of criminal responsibility in favour of assessing the level of risk an individual posed to society. They advocated that the criminal law was for the 'defence of society' rather than as a mechanism of punishment flowing from an individual's intent to do harm. In this view, the role of the criminal law was to respond to the dangerousness of the subject, not whether that subject was legally

responsible. At the time, this was successfully resisted by the criminal lawyers as anathema to the rule of law. However, Foucault maps how the criminology of risk prevailed in the criminal law in subtler forms, arguing criminal law practice and its legal determinations were structured by the 'psycho-social hegemony' of delinquency (Foucault 1990: 145). The incorporation of disciplinary knowledge in penalty (forensic science, psychology, criminology) gradually transformed the idea of the harmful act into the potential danger inherent in the individual. The concept of legality in practice thus shifted from acting on the crime to acting on the criminal (Foucault 1990: 144).

In liberal philosophy, the law creates the rational grounds for criminalisation according to what one does. In liberal understandings of the relationship between law and policing, the Police prevent social risks presented by risky subjects by responding to how the individual violates the law, or might do so in the future. Understanding the police power as a rationale of the criminal law is essential to criminal law as a mode of state regulation or governance aimed at securing or 'civilising' order (Farmer 2016). The police power is characterised not by categorical prevention, but the discretion to choose whatever measures are best suited to maintaining a particular social order (Dubber 2006). Importantly, Dubber argues the police power mode of the criminal law coexists with other forms of state authority, particularly the 'due process' model of the criminal law based on its autonomy. Through the ideology of autonomy (legality), the police power model drives the reality of the criminal process, where the object is to disrupt and incapacitate risky subjects or future crimes.

The coexistence of multiple sources of authority for the criminal law underscores tensions between the criminal law deriving legitimacy through prevention and efficiency through acting upon future threats, whilst simultaneously being institutionally grounded in acting on past actions and principles of legality. A large body of literature on the sustained 'preventive turn' of the criminal law over the last two decades (Ashworth and Zedner 2014; Zedner 2009) suggests an incompatibility between prevention/pre-emption and criminal law principles or, alternatively, that the justificatory norms of the criminal law have been eroded. Whilst others point to how the operation of the criminal law on risk and future threats is neither novel nor exceptional, our greater interest here is with the specific questions and tensions that might be foreclosed by 'criminal law's self-understanding' (Farmer 2014) that law is distinct from the police power. We consider these tensions in the final part of this article.

### **Political contexts**

NSW is no stranger to hyper-legislative activity, with the constant production of criminal law and police powers underpinned by an enduring penal/law and order populism (see Hogg and Brown 1998). Whilst the specific features of NSW law and order are relevant, globalised forms of governance through crime control also make this a characteristic of most other Australian states, more recently aided by increasingly coordinated, national and transnational agendas and interagency efforts on combating local and international organised crime. Since at least 2008, the production of organised crime and biker gangs as a serious threat has been a unifying theme in political discourse justifying the formal expansion of criminalisation across Australia nationally (Ayling 2011). The designation of 'declared organisations' and associated control orders has been well critiqued as eroding fundamental rights and criminal law norms in NSW (Cowdery 2009; Loughnan 2009; McGarrrity 2012). However, while these trends around organised crime are pre-figured by an expansive regime of counter-terrorism laws over the last 15 years (Loughnan 2009; McGarrrity 2012), the so-called 'pre-emptive turn' has a longer history. The rise of pre-emptive criminalisation targeted to associations and membership for threats of 'serious crime' must be understood in the context of older, settler-colonial formations of criminalisation.

Importantly, the over-policing of Indigenous peoples is testimony to the racialised foundations of Australian laws which have criminalised status to accomplish dispossession, while maintaining the fiction that law criminalises 'doing' rather than 'being'. The practice of regulating and

punishing Indigenous peoples through public order offences—including offensive language, public drunkenness and then ‘protective custody’—has been well documented for their structural effects in disrupting self-determination (Cunneen 2001). In these very material senses of ‘pre-emption’, the criminalisation of Aboriginal and Torres Strait Islander peoples exemplifies the police power function of criminal law. Moreover, the indistinction between police powers/criminal offences has been central to the specific forms of punitive regulation enabled by NSW criminal justice processes. For example, proactive bail policing is a cause of the increase in the Indigenous remand population in NSW, one of the fastest growing in Australia (Bureau of Crime Statistics and Research 2016: 17).

The revival and recalibration of the NSW consorting laws through the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) further exemplified the inherent fusion between pre-emption, police power and criminal law. The 2012 amendments<sup>1</sup> made it an indictable offence to associate with a convicted offender on two or more occasions, regardless of the purpose of the meeting (McNamara 2014). The elements of the new consorting offence require that Police have warned an accused that they have consorted with a person who has been convicted of an indictable offence before a charge can properly be made. But, in practice, the new consorting regime has continued the historical pattern of consorting being used as a police power rather than an offence which is prosecuted (Steel 2003), with 9,100 warnings issued as compared to 42 people charged with 46 offences between April 2012 and April 2015 (NSW Ombudsman 2016: 3).

In justifying the introduction of both serious crime prevention orders (SCPOs) and public safety orders (PSOs), the NSW Minister for Police claimed they were part of a strategy for building on the success of the consorting offences, ‘which have proved successful and are having a significant effect on numerous crime groups’ (Grant 2016: 78). However, the NSW Police are using their consorting powers to target a wide range of ‘suspect populations’. In its 2016 review of the legislation, the NSW Ombudsman presented data that showed that Police used consorting powers disproportionately against Aboriginal peoples and young people. The Ombudsman found also that Police were consistently wrong when identifying young people as ‘convicted offenders’, resulting in 79 per cent of all consorting warnings being made in error (NSW Ombudsman 2016: 4). The Ombudsman further found that NSW Police made a policy decision to extend the scope of the provision to all criminal offences, instead of limiting it to organised crime as originally intended by Parliament. Thus, consorting was used not only by the NSW Police Gang Squad and other specialist forces, but also by general duties officers. Where consorting warnings were issued by general duty officers, 44 per cent of the people targeted by general duty officers were Aboriginal, compared to 13 per cent of those targeted by specialist squads (NSW Ombudsman 2016: 4).

The Ombudsman’s review made 20 recommendations, 13 of which focused on amending the NSW Police Force’s policies and procedures. In taking this approach, the recommendations sought to regulate and fine-tune the use of consorting rather than challenge the conceptual basis for the offence and the premises it shares with the police power model of the criminal law. Indeed, the report argued that the consorting laws had been used to ‘disrupt serious and organised crime’ and that the amendments were necessary ‘to mitigate the unintended impacts of [the law’s] operation’ (NSW Ombudsman 2016: iii). In effect, the recommendations did little to de-legitimise the use of the consorting offence or to challenge the significant political lobby for and trend towards the expansion of formal police powers in NSW. In recent years, this trend has included: the erosion of the right to silence (Dixon and Cowdery 2013); the expansion of the law of arrest enabling its proactive use for the purpose of preventing crime (Sentas and McMahon 2014); and the systematic use of a statutory DNA ‘back-capture’ scheme to target, in the absence of suspicion or investigation, previously untested former offenders (*Crimes (Forensic Procedures) Amendment Act 2008* (NSW)).



There are significant institutional drivers towards this expansion of police powers. The integration of broader business and development interests into NSW government agendas for infrastructure, roads, local council governance and coal seam gas mining has underpinned some of the new criminal laws, especially in relation to protests (see below). Police power has also been central to this process. The historic, well documented power of both the NSW Police Association and the NSW Police Force as political actors shaping NSW criminal law (Finnane 2000) was manifest in the April 2014 amalgamation of the Attorney General's and Justice Department with the Police and Emergency Services portfolio into a single 'Police and Justice' cluster. The reshuffling of the new Minister for Justice and Police as senior to the Attorney General arguably 'either allowed or created the perception of police interests setting the priorities for criminal justice policy in this State' (NSW Bar Association and Law Society of NSW 2016). Moreover, an already weak police accountability framework was further eroded in 2016 by the amalgamation of the police division of the NSW Ombudsman and the Police Integrity Commission into one single body, the Law Enforcement Conduct Commission. This decision followed a recommendation by the Tink (2015) *Review of Police Oversight*, which was advocated strongly by the NSW Police Association and aimed strategically at weakening the power of the Police Integrity Commission (Police Association of NSW 2014). The review rejected options for civilian investigation of police complaints or greater power for oversight bodies to make recommendations that bind the Commissioner of Police (Tink 2015).

In sum, there is a longstanding context in NSW of policing strategies (the incorporation of risk, pre-emption and punitive coercive measures) that are associated with the police power function of the criminal law. This provides the framework for discussing the four pre-emptive regimes outlined below.

#### **Four new pre-emptive criminal regimes: An overview**

##### *Serious crime prevention orders*

The *Crimes (Serious Crime Prevention Orders) Act* 2016 (SCPO Act) commenced on 25 November 2016 after being announced and introduced into Parliament on 22 March 2016. The rationale for SCPOs is to 'prevent, restrict or disrupt involvement by certain persons in serious crime related activity' (Grant 2016: 73-78). Together with PSOs, they were framed as part of the NSW state government's 'election commitment to introduce tough new powers to give Police the upper hand in the fight against serious crime' (Grant 2016: 73-78). The NSW law is adapted from the United Kingdom's Serious Crime Orders introduced in 2007 (Methven and Carter 2016) and, more broadly, forms part of a national approach to organised crime first set out by the Commonwealth Organised Crime Strategic Framework in 2009 (Australian Government 2009).

The SCPO Act enables the Commissioner of Police, the Director of Public Prosecutions (DPP) or the New South Wales Crime Commission to apply for court orders<sup>2</sup> restricting the activity of a suspect, based on allegations of involvement in criminal activity, or as a post-conviction control. The court has an open-ended power to impose whatever prohibitions, restrictions or requirements it thinks will prevent, restrict or disrupt the person. For example, orders can ban the suspect from types of locations, restrict their movements and subject them to ongoing curfews for up to five years. A breach of the order carries a maximum penalty of five years' imprisonment.

These orders are determined on the balance of probabilities and can be applied without any evidence that the suspect has committed a crime, and in a wide range of circumstances. SCPOs represent the most extensive form of supervisory order now available and are substantially more expansive than existing control order schemes, both in terms of the target population and the scope of the order.

### *Public safety orders*

The *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016* (NSW) was introduced at the same time as the SCPO legislation and commenced on 31 March 2017. Like SCPOs, PSOs were justified by government as necessary to combat organised crime and ‘disrupt the activities of serious criminals’, to ‘prevent people from going to certain places’ (Grant 2016: 73). The Act introduced a range of measures including strengthening forfeiture of property from the proceeds of crime. Our focus here is with the new PSO regime introduced into Part 6B *LEPRA 2002* (NSW), and modelled on similar provisions in South Australia. PSOs can be made by a senior police officer, if they believe that the presence of a particular person (or class of persons) at a public event, area or other premise poses a ‘serious risk to public safety or security’ and if Police believe the order is ‘reasonably necessary’ to mitigate the risk. Police may make the order for up to 72 hours but, in practice, it may be for much longer as it can be for the duration of an event, including multiple evenings covering the same event. As with the SCPO, contravention of a PSO attracts up to five years’ imprisonment.

### *Investigative detention*

Enacted on 16 May 2016, the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016* (NSW) amended the *Terrorism (Police Powers) Act 2002* (NSW) to extend the existing regime of detention without charge, in two ways. First, NSW Police may now arrest a terrorism suspect as young as 14 years of age (previously over 16 years of age) for the purpose of preventative, ‘investigative detention’. That is, arrest and detention are not for the purpose of charging someone suspected of having committed a crime, but for investigation/prevention of crimes that have not occurred. Whereas previously only the Supreme Court could authorise preventative detention, NSW Police are now empowered to detain a person for up to four days and may apply to an eligible judge by telephone to extend the detention period to up to 14 days. During that period, all contact the detained person has with others (excluding legal advice) is monitored and contact with specified persons, including family members and the detained person’s lawyer, can be prohibited in the detention warrant. Second, the Act now permits police questioning of the suspect for periods of 16 hours or more at a time.

These extensions to the police power in NSW were subsequently incorporated into the model for a national approach to counter-terrorism agreed at a special meeting of the Council of Australian Governments (COAG) in October 2017. While, at the time of writing, the Commonwealth and states have not yet drafted legislation, the agreement included the extension of the police power of investigative detention for up to 14 days, through expanding the target population from those 14 years of age and older to 10 years of age and older (COAG 2017).

In NSW, these new police powers were framed as a necessary preventive response to an evolving, younger, terrorist threat and justified as rectifying ‘operational gaps’ in the existing preventative detention regimes, namely, that criminal intelligence relied upon by police for detention applications were scrutinised by the court and made available (albeit redacted and partial) to the defence (Baird 2016: 52-53). The implications of the use of police intelligence as untested and secret evidence across the new laws is discussed below.

### *Anti-protest laws*

The *Inclosed Lands, Crime and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW)<sup>3</sup> was introduced to restrict ‘risky protest activities’ at coal seam gas and other mining sites, and major roads construction sites such as Sydney’s WestConnex project.<sup>4</sup> While framed in terms of personal risk, the government was clearly concerned to protect commercial interests. The NSW Minister for Industry, Resources and Energy stated the legislation was designed ‘to create a deterrent to illegal behavior by protestors’, complained of the costs to business caused by protestors locking themselves into access gates and erecting structures that obstructed access to

mine sites, and cited six cases where mining operations were halted as a result (Roberts 2016: 7012-7014, 7029-7031).

The Act created a new offence of 'aggravated unlawful entry' if a person interferes with or intends or attempts to interfere with the conduct of a business. Alternatively, it is an offence if a person does anything that gives rise to a 'serious risk to safety'. Rather than the maximum fine of \$500 attaching to trespass, the aggravated offence attracts a \$5,500 maximum fine. The Act also expands the offence of intentionally or recklessly 'interfering' with a mine to include hindering the work of any equipment associated with the mine, which carries a penalty of up to seven years' imprisonment.

The Act gives NSW Police additional powers of search and seizure without warrant if there are reasonable grounds to suspect a person has items to be used to lock on to a structure for the purpose of interfering with the conduct of a business or that will be used in a way that is a serious risk to safety. It also undermined the longstanding prohibition in *LEPRA 2002* (NSW) against Police giving move-on directions to protestors. Now Police may give directions to protestors if the officer believes there is a 'safety risk'. Police are additionally empowered to move-on protestors if obstructing traffic and if either not an authorised public assembly under the *Summary Offences Act 1988* (NSW) or not substantially in accordance with an authorisation given. Failure to abide by these directions will result in a criminal offence, punishable by a fine of up to \$220.

### **Criminal law as police power: Four features**

This section considers the combined effects of the new criminal law regimes to identify as police power their four distinct features: i) the expansion of the target population; ii) the expansion of the harms to be intervened against; iii) the transfer of judicial to police power, and; iv) the extended mimicry between 'legal' and 'policing' forms of control.

#### ***i) Expansion of target populations***

The new criminal laws incorporate expansive categories defining new classes of suspects subject to police power. These laws widen the population targeted for criminalisation by formalising a policing concept of 'the suspect' that is drawn from institutional police practices. Pre-emption is embedded as a primary rationale for these practices, and is justified typically by an elastic notion of potential serious criminality that blurs conventional distinctions between summary and indictable offences, serious and less serious offences, and so on. Ideologically, these practices conflate what the public might associate with 'serious crime'—for example, murder or significant violence—with a much wider range of offending. Thus, a SCPO can be made against a person who has been convicted of a 'serious crime', which is defined as any offence subject to five years or more of imprisonment. This subjects most offences in the *Crimes Act 1900* (NSW) and many of the offences of the *Drugs Misuse and Trafficking Act 1985* (NSW) to pre-emption. As a result, offences such as shoplifting (larceny), rock throwing, riot and affray, and possession and cultivation of a prohibited plant sit in the same category for targeting.

Moreover, extending Dubber's concept of the 'offenderless offence', a SCPO can be issued against a person who has not been charged with an offence or who has been acquitted. This illustrates how the target populations of this legislation are those of whom the Police are suspicious without having sufficient evidence to charge them with an offence. In this way, the legal subject of the order is the same as the low threshold police category of the 'person of interest'. The police suspect is assembled from the entire range of proxies for guilt that are available to Police (being known to Police; prior offending history; and associations, imputed or real). Accordingly, through SCPO, criminal law formally incorporates and expands the policing concept of the suspect as the basis for punitive control. Not only is the suspect defined legally prior to evidence of a *prima facie* case, or after an acquittal, the targets of SCPO are those whom the Police decide are suspicious.



Lastly, a person may be subject to a SCPO if ‘involved in serious crime related activity’. This includes facilitating another person’s engagement in a serious crime, or the *likelihood* the person may facilitate another person’s engagement. The subject need not be suspected by Police of having engaged in serious crime. As with the consorting regime, the framing of suspicion justifying police intervention is the criminal association identified by the Police. Criminalising facilitation legitimises the policing of family, social and community networks who the Police believe ought to be targeted—or can be targeted—for the purposes of constructing and controlling a suspect population (McConville et al. 1991: 14-35).

Critiques of SCPOs have highlighted their construction as civil orders attracting criminal penalties for breaches that might not otherwise justify a criminal charge. Methven and Carter, for example, argue that the ‘use of “hybrid” civil orders ... not only evades important criminal law safeguards, but it also undermines central bases of the rule of law’ (Methven and Carter 2016: 234). Prior to the legislation being passed, the NSW Bar Association warned that: ‘the Bill creates a very real danger of arbitrary and excessive interference with the liberty of many thousands of New South Wales citizens’ and that the new powers ‘are extraordinarily broad and unprecedented, and are not subject to any substantial legal constraints or appropriate judicial oversight’ (NSW Bar Association and Law Society of NSW 2016: 2).

Orders of this sort plainly do represent a means by which the legal processes of criminalisation are extended beyond the notional requirement that criminality is defined by guilt of criminal offending. However, the key dynamic for this legislation, which requires an interpretation that goes beyond the erosion of procedural rule of law norms, is the assertion of police power as a means of defining the scope of the criminal law. This is illustrated further by the extended investigative detention regime. The whole array of anti-terrorism laws has been justified through discourses of necessity and risk. However, the steady replication of the expanded police powers introduced by these laws (for example, extended periods of detention and control orders) to cover other forms of association, such as outlaw motorcycle gangs and serious criminal groups, belies claims to exceptionalism. Rather, ‘operational necessity’, defined largely according to opaque police requirements has become an almost unchallengeable justification for further powers.

The new investigative detention regime not only reduces the age of those who can be detained to include children for whom there are specific procedural protections across other domains (including criminal) of the law, but also removes from the process any judicial scrutiny of the evidence or suspicion used by the Police to justify the detention. In this way, the Police are both extending the scope of the targeted population defined according to police conceptions of risk and positioning themselves as primary law-makers by exercising largely unaccountable, discretionary powers bestowed formally upon them by a willing and compliant legislature.

## *ii) Expansion of the harm/ threat justifying police intervention*

The categories of ‘serious crime’, ‘serious risk’ and ‘safety risks’ expand the concept of harm and amplify the threats sought to be forestalled. Conceptually, the boundaries of such risk categories are fluid and vaguely constructed across the new laws. For the Police, ‘serious risks to public safety’ are the threshold question in relation to PSOs; ‘serious safety risks’ to any person trigger the anti-protest laws; and ‘preventing a terrorist act’ enables investigative detention. For the courts, the threshold for issuing a SCPO is the necessity to ‘protect the public by preventing, restricting, disrupting’ a person’s involvement in serious crime. Ultimately, the meanings in law given to these various indicators of potential harm will derive from police interpretations, and the categories will be brought into being and normalised through the interaction of police and judicial practices.

The role of the Police as primary definers of the new laws does not mean the laws lack political purpose. While the concept of 'the public' in criminal law has always been an amorphous cipher for maintaining social order, the NSW government's justifications for the new anti-protest laws removed any ambiguities. In the limited parliamentary debates, protecting 'the public' was associated explicitly with protecting mining industry and business interests. Alongside forestalling any 'risk to business', the concept of 'unsafe protest activities' (Roberts 2016) was discursively deployed to reframe the place of civil disobedience and protest as secondary to, and incompatible with, the economic safety of business and corporations. According to one prominent NSW Liberal Party government minister: 'By community standards there are some actions that should clearly not be supported. Threatening the safety of others and causing disruption to legal business activities are clearly in that camp' (Roberts 2016).

Police have always been primary definers of legitimate protests, routinely intervening against presumed threats of violence and to public order, including when protests have been authorised under the *Summary Offences Act 1988* (NSW).<sup>5</sup> However, the new laws undermine the Part 4 provisions and make Police 'the arbiters of what makes a legitimate protest' (McNamara and Quilter 2016) by empowering them to move-on protestors when the officer 'believes on reasonable grounds' there is a 'serious risk to the safety' of the person targeted 'or to any other person' (s 200 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)). This constructs a new legal standard to justify move-on directions against protestors, even when the protest is authorised or 'apparently genuine', and formalises institutional police power into criminal law's power to police. Because 'safety risks' are not defined in this legislative scheme, it gives Police broad discretion to disrupt protests. Moreover, it is left to the Police to decide whether an authorised protest is operating 'substantially in accordance with any ... authorisation', and what constitutes the obstruction of traffic. No general guidance, statutory or otherwise, is provided on the right to protest. This is despite several NSW Supreme Court cases establishing that disruption and inconvenience and even 'aggravation and a risk of danger' are not grounds for refusing permission for staging a peaceful demonstration (see, for example, *Commissioner of Police v Langosch* [2012] NSWSC 499).

The police power to interpret risk rests in part on status and association as enduring justifications for criminal law. In relation to status, Police can issue a PSO if they are satisfied there is a serious risk that the person's presence might result in death or serious physical harm to a person, or serious damage to property. Before concluding that the order is 'reasonably necessary', Police must consider several matters, including whether the person has a history of 'engaging in serious crime related activity', recalling that neither charge nor conviction is required, and the breadth of the definition of serious crimes (s 87R *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)). Thus, future threats attach to the status of the person, making it possible, for example, for a 'bikie' at a public event to constitute sufficient basis for Police to be satisfied there is a risk of violence.

In relation to association, counter-terrorism laws generally target networks of people suspected of engaging in terrorist acts. For the purposes of investigative detention, a terrorist suspect is defined as someone committing, 'involved in preparing or planning', or possessing 'a thing that is connected with the commission of, or the preparation or planning for, a terrorist act' (s 25B *Terrorism (Police Powers) Act 2002* (NSW)). As noted above, the evidentiary basis for detention cannot be tested substantially before a court. Rather, the Police are empowered to detain 'a terrorism suspect for investigation into a past or future terrorist act for the purposes of assisting in or responding to or preventing the terrorist act' (s 25C *Terrorism (Police Powers) Act 2002* (NSW)). The broad scope of these provisions, the secrecy surrounding the detention process, and the absence of any independent interrogation of the nature and level of the presumed risk mean that police assessments of what constitutes a threat, the methods deployed to establish the threat, and the extent to which detention is used for purposes such as intimidation and control, go largely

unchallenged. This illustrates in its purest form the centrality of police power to the constitution of criminal law and the use of risk as a key ideological device for legitimising that power.

### *iii) Transfer of judicial to police power*

In normative terms, the increased legislative authority for the Police to operate as a key definer of risk elevates institutional police power over traditional 'judicial power'. On one reading, the transfer of judicial power is the key, troubling characteristic of the two new supervisory orders. However, we argue that the dichotomy of distinct categories of judicial/police power fails to capture fully the operation and effect of the policing processes enabled in the criminal law.

PSOs provide a mechanism for Police to determine the basis on which targeted individuals or groups can be present in a public place and engage in public activity (McNamara and Quilter 2016). Through the PSO legislation, Police have acquired unconstrained, primary decision-making power to make an order. This decision-making power is fortified through the police capacity to rely on intelligence rather than independently scrutinised and tested evidence, and is protected further by the very limited legal bases for appeal against the imposition of an order. While Police must give reasons for a PSO to the person subject to the order, they are not required to disclose information considered to be criminal intelligence or 'other criminal information' and the Commissioner of Police can apply to the court to protect disclosure of criminal intelligence or other criminal information used to justify the order. An appeal to the Supreme Court is only available if the order lasts longer than 72 hours. Whilst the appeal is fashioned as a merits review, any such review is a severely circumscribed right if the asserted grounds cannot be tested. Procedurally therefore, the PSO legislation formalises a devolution or transfer of judicial power to the police authority.

But, the primary role of the Police is less significant for its due process implications than for its reflection of the sovereign, law-making power of Police to presumptively decide on guilt and mete out punishment as a feature of every day modern policing (Neocleous 2000). This power is reflected by the police capacity to identify and target potential subjects of the order and to shape and control the information that underpins the decision to issue the order. This in turn enables Police to control the relationship between the police authority and the subject of such interventionist orders, regardless of procedural variations and the formal role of the court.

This is important to note when comparing the procedural requirements for the PSO and the SCPO. While the District Court (post-conviction) or Supreme Court (no conviction) issues a SCPO, as with the PSO, the person subject to the order is not provided with the information used by the Police, DPP or Crime Commission to ground the order. The putative judicial functions required to issue the SCPO rest upon and effectively legitimise the secrecy surrounding the police construction of evidence. Restricting access to the basis on which the need for the SCPO is asserted effectively shields from challenge or scrutiny the initial police designation of a person as a legitimate target for a SCPO, the reasoning behind the designation, the methods used to obtain and formulate the evidence, and external political imperatives such as a perceived need to be visibly targeting identified 'suspect' populations. In this respect, the formal judicial decision by the court is not only in essence a decision of police intelligence but also operates as criminal laws' power to police.

The transfer of judicial to police power and the inter-relationship between judicial and police power illustrate how criminal law is constituted through, and draws upon, different modes of authority and power. Through these supervisory orders, police power is one, increasingly dominant, defining mode of criminal law. However, police power is not static. Police power operates in tension with judicial power, sometimes appearing to supersede it (as with the PSO), or (as with the SCPO) relying upon judicial authority to confer legitimacy within the orbit of due

process. Either way, the constitutive function of police power is the important dynamic to criminal law revealed in the new orders.

*iv) Criminal law's punitiveness is exercised through control, confiscation, and disruption/pre-emption as well as penalties*

The four legal regimes provide new and increased formal powers of arrest, search, detention and interrogation, confiscation and forfeiture to Police. Combined, these new powers reproduce and embed a logic of pre-emption and disruption in the criminal law. As noted above, this reflects the function of risk as a formative ideology of police power. It also confirms Dubber's insight regarding status and character offences that 'the object of police governance through the criminal process is the threat, not the offender' (Dubber 2006: 135).

Being given legal authority to intervene directly against a designated risk enables Police to ground criminality in a state of being or surrounding circumstance dissociated from the minimum expectations of individual agency inscribed in criminal law through the requirement for *actus reus* and *mens rea*. Through pre-emption and disruption strategies, Police are able to institutionalise the criminalisation of target groups, extend police powers and expand the scope of criminal law.

For example, investigative detention extends the police power of arrest to a person who has not yet committed an offence. The broad definition of the 'terrorism suspect' and the unspecified nature of the future terrorist act enable arrests and prolonged detention as core operational strategies. The provisions explicitly create a pre-emptive arrest power for the purpose of incapacitation or disruption insofar as they are 'responding to or preventing the terrorist act'. This lowers the common law threshold (reflected in other statutory arrest powers such as s 99(3) *LEPRA 2002* (NSW)) that an arrest must be necessary for the purpose of initiating proceedings against a suspect, and normalises the use of arrest primarily for the purpose of intelligence gathering.

Similarly, some of the new offences are designed to function as police power (Dixon 1997) in much the same way as the offence of consorting (Steel 2003). For example, the offence of aggravated unlawful entry threatens a serious sanction against refusal to move-on or vacate property in protest situations. Combined with the extended move-on powers in s 200 *LEPRA 2002* (NSW), the 'reasonable force' allowable when exercising the arrest power against individuals deemed by Police to be interfering or intending to interfere with a business or representing a serious risk to personal safety inevitably will involve groups of heavily armed Police moving into and disrupting protests in circumstances where the putative risk posed by an individual is attributed to the collective whole.

Finally, police power is extended through the imposition of criminal sanctions for breaches of the new interventionist orders. Resisting the exercise of police powers is already criminalised in other contexts, notably the refusal to comply with move-on directions (s 199 *LEPRA 2002* (NSW); s 9 *Summary Offences Act 1988* (NSW)). However, the potential prohibitions, restrictions and other requirements that can be imposed under a SCPO are broadly defined and attach to a potentially wide range of police powers that make breaches relatively easy to enforce. While the SCPO is fundamentally a control order in that it regulates a perceived risk, its monitoring fits into a wider web of police surveillance practices, such as bail compliance checking and Suspect Targeting Management Plans (Sentas and Pandolfini 2017). The fact that a SCPO is imposed through civil proceedings that escalate to criminal proceedings if the order is breached indicates both the punitive consequences of non-compliance with police operational decisions and the centrality of police powers to the construction of criminality.

### **Conclusion: The police powers function of the criminal law**

Most studies of pre-emption analyse it in isolation from the police power, which is posited as related to but separate from the criminal law. In this register, the pre-emptive turn reflects the law's colonisation by expansive imperatives of risk prevention. However, as Farmer (2014) argues, the criminal law's 'self-understanding' that it is *not* police power and *not* a mode of security governance, necessarily limits analyses that focus on criminal law's primary function of securing social order:

The alignment of law with liberty against security has prevented more systematic investigation of the question of the extent to which criminal law can itself be conceived of as a security project or the extent to which law enables or buttresses a larger security project. This is not just a matter of detailing the specific references to security in the criminal law—for instance in recent anti-terrorism legislation—but of reconstructing in a more general sense how the criminal law has contributed, and has seen itself as contributing, *to the securing of social order* [emphasis added]. (Farmer 2014: 399)

Taking the centrality of maintaining order to the construction of criminal law and the operation of law as an expression of the police power as our points of reference, we have argued that recent criminal law reform in NSW exemplifies four features of criminal law that are productive of its police power. These are an expansion of the target populations subjected to police supervisory control; the amplification of the risks or threats imagined to be intervened into to include threats to business and low thresholds justifying intervention; the transfer of judicial to police power; and the expansion of punitive strategies of control and confiscation.

Combined, these four features indicate policing social order in NSW does not operate in isolation from or alien to criminal law but as one essential part of its operative logic(s). Ideological commitments to due process and 'the legal' as bulwarks against state power can legitimise and amplify criminal law's police power to expansively define and capture its targets. This is not to suggest there are not important limit points in the legal form of criminal law's power to police. Rather, it is significant that the objects of crime/security are distinctly neither the proper subjects of police power *nor* criminal law alone. Moreover, we see a specific production of pre-emptive criminal law from the perspective of its police power, rather than starting and ending with the assumed autonomy of the criminal law. In combination, these four new regimes reflect the state's concern with protecting its interests through a range of inter-related strategies based on different modes of authority and power. In the current period, police power is a dominant driver of criminal law. Pushing back against the developments we have discussed involves analysing and challenging the ways in which police power is constituted and exercised through criminal law.

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<sup>1</sup> Now contained in s 93X Crimes Act 1900 (NSW).

<sup>2</sup> District or supreme court, depending on the category of suspect.

<sup>3</sup> The provisions of the Act relating to aggravated trespass, interfering with a mine, commenced on 1 June 2016. Provisions relating to police powers commenced on 1 November 2016.

<sup>4</sup> There has been considerable opposition to coal seam gas operations in New South Wales. See, for example, <http://www.lockthegate.org.au/>. WestConnex is a major motorway project being built in the densely populated inner western suburbs of Sydney. It has provoked considerable opposition from resident groups and others. See <https://www.westconnex.com.au/>; and <http://www.westconnexactiongroup.org.au/>.



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<sup>5</sup> See, for example, *Commissioner of Police v Rintoul* [2003] NSWSC 662. Despite authorisation from the NSW Supreme Court allowing a protest outside the vacant home of then Federal Immigration Minister, Philip Ruddock, and the demonstration being peaceful, police prevented demonstrators gaining access to the street where the house was located. Although the police refused to give reasons for their actions at the time, it was later reported they did so to prevent a 'disturbance'.

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